

JOHN J. SCHNABEL
JOSEPHINE JURGELEIT

IBLA 84-442, IBLA 84-548

Decided December 30, 1985

Appeal from decisions of the Anchorage District Office, Alaska, Bureau of Land Management, declaring mining claims null and void and rejecting location notices filed for recordation. AA-42812 through AA-42816 and AA-44470.

Affirmed as modified.

1. Mining Claims: Lands Subject to -- Segregation -- State Selections

Under the "notation" rule, BLM may properly declare an unpatented mining claim null and void ab initio where it is located at a time when the land is noted on the public land records as subject to a state selection, even though the notation is erroneous because the selection has already been invalidated by a BLM decision.

APPEARANCES: James N. Reeves, Esq., Anchorage, Alaska, for John J. Schnabel; Josephine Jurgeleit, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, United States Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

John J. Schnabel has appealed from a decision of the Anchorage, Alaska, District Office, Bureau of Land Management (BLM), dated March 19, 1984, declaring the W. E. Placer, F. E. #2, F. E. #3, Black Bear #2, and Black Bear #3 mining claims, AA-42812 through AA-42816, null and void ab initio and rejecting the location notices filed for recordation with BLM. Josephine Jurgeleit has appealed from a similar decision, dated April 20, 1984, which declared the Jim Nail placer mining claim, AA-44470, null and void ab initio and rejected the location notice filed for recordation. 1/ _____

1/ Because of the similarity of legal and factual issues involved, we have consolidated the appeals for decision sua sponte.

The location notices indicate that all the claims were located in sec. 28, T. 28 S., R. 54 E., Copper River Meridian, Alaska, and filed for recordation with BLM as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1982). The notices for the W. E. Placer, F. E. #2, F. E. #3, Black Bear #2 and Black Bear #3 claims were posted on February 10, 1981, and filed with BLM on May 5, 1981. The notice for the Jim Nail claim was posted on May 28, 1981, and filed with BLM on August 21, 1981.

The BLM decisions declared appellants' mining claims null and void ab initio because, at the time appellants' claims were located, the subject lands had already been selected by the State of Alaska pursuant to selection application A-60929 (formerly J-11279), filed on September 26, 1958, which segregated the land from mineral entry under 43 CFR 2627.4(b).

BLM has filed with the Board, in each case, an instrument entitled "Supplemental Basis For Decision." BLM explains therein that the State's selection of sec. 28, T. 28 S., R. 54 E., Copper River Meridian, Alaska, was finally rejected by its decision of July 27, 1964. BLM points out that the sole basis for its decisions in the appeals now before us is the notation rule, since BLM's master title plat (MTP), continued to show sec. 28 as selected by the State of Alaska, despite the fact that the land was not re-selected by the State.

In her statement of reasons, appellant Jurgeleit states that she and her husband have been on the claim since 1948, having built a cabin and worked the ground. Appellant's location notice asserts that her discovery was made on July 25, 1964. As indicated previously, however, appellant's location notice was posted in May 1981 and filed with BLM in August 1981. Thus, even though appellant alleges the location of a claim prior to the withdrawal, her own location notice alleges a discovery after the withdrawal, which would be too late. In any event, her failure to record this original claim prior to October 22, 1979, rendered that claim abandoned and void. See United States v. Locke, 105 S. Ct. 1785 (1985).

Schnabel, in his statement of reasons, contends that the notation rule does not apply to an "erroneous notation" of a previously invalidated entry which has been left on the official public land records. He asserts that the notation rule is based upon the existence of a prima facie valid segregation of the land, which has yet to be invalidated by a "competent tribunal" and which is duly noted in the records, citing Hodges v. Colcord, 193 U.S. 192, 195 (1904). Appellant Schnabel argues that, in any case, the notation rule was declared invalid in Kalerak v. Udall, Civ. No. A-35-66 (D. Ark. Oct. 20, 1966), rev'd on other grounds, 396 F.2d 746 (9th Cir. 1968). In response to Schnabel's statements of reasons, BLM argues that the rule applies to all notations until they are removed from the public land records, and, further, that the purpose of the rule is to give all members of the public equal notice and opportunity to file by allowing members of the public to rely on the fact that no one can gain a priority right by going behind the notation.

[1] It is well established that under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state application to select lands segregates the lands from all subsequent appropriation, including location under the mining laws. Fred Thompson, 74 IBLA 231 (1983); John C. and Martha W. Thomas (On Reconsideration), 59 IBLA 364 (1981). However, in order to attribute a segregative effect to the filing of a state selection application the selection must be "regular on its face." State of New Mexico, 46 L.D. 217, 222 (1917), over-ruled on other grounds, 48 L.D. 97 (1921). There is no evidence in the present case that state selection application A-60929 was not regular on its face when filed. However, the record indicates that on July 27, 1964, BLM rejected the state selection application in part as to sec. 28, T. 28 S., R. 54 E., Copper River Meridian, Alaska. That rejection revoked the segregation occasioned by 43 CFR 2091.6-4 and 2627.4(b).

We, therefore, turn to the question of the effect of the "notation" or "tract book" rule. The Department has long held that the availability of land for appropriation or lease must be determined by recourse to the public records of BLM. Thus, if BLM records have been noted to reflect the devotion of land to a particular use that is exclusive of another conflicting use, no incompatible rights in the land can attach by reason of any subsequent application until the record has been changed to reflect the true status of the land. This rule generally applies even where the notation was posted to the records in error or where the segregative use so noted is void, voidable, or has terminated or expired. Shiny Rock Mining Corporation (On Reconsideration), 77 IBLA 261 (1983); Irvin D. Bird, Jr., 73 IBLA 210 (1983).

In the present cases, at the time appellants located their mining claims and filed their location notices for recordation with BLM, the applicable MTP indicated that sec. 28 was still subject to state selection A-60929. That notation was not deleted from the MTP until June 27, 1984, subsequent to the BLM decisions appealed herein. ^{2/} We have also examined the historical index with respect to T. 28 S., R. 54 E., Copper River Meridian, Alaska, and the serial register page for state selection A-60929. Neither the historical index nor the serial register page specifically indicate that, after July 27, 1964, sec. 28 was no longer subject to state selection A-60929, as was the case.

We recently had occasion to review the notation rule at some length in B. J. Toohey, 88 IBLA 66, 92 I.D. 317 (1985), in the context of state selection applications and conflicting mining claims, and generally affirmed the rule. We held that notation of state selection applications on MTP's has the effect of segregating the land from all subsequent appropriation, including

^{2/} By letter dated July 3, 1984, BLM notified all the mining claim locators to whom it had issued decisions concerning mining claims located in sec. 28, T. 28 S., R. 54 E., Copper River Meridian, Alaska, that the erroneous notation of the official BLM land status records had been removed and that the segregative effect of the notation on the unpatented lands ceased to exist at that time.

locations under the mining laws, regardless of whether the selections are void or voidable. In Toohey, the state selections were void or voidable because they included land within the Chugach National Forest, which was not available for selection. We applied the notation rule to invalidate the conflicting mining claims.

Implicit in our analysis in Toohey was the conclusion that the notation rule will apply regardless of whether the notation was erroneous because the state selection was in fact invalid. Indeed, that is one of the primary applications of the rule in this context, for if the prior state selection were valid it would independently operate to segregate the land under 43 CFR 2091.6-4 and 2627.4(b). The notation rule recognizes that administrative errors are bound to occur in the notation of the public land records and, in order to promote fairness amongst potential claimants for the land who must necessarily rely on those records, the land will not be considered open to location until the segregative notation is deleted.

We dealt in Toohey with the question of whether the notation rule was itself invalidated by the district court in Kalerak v. Udall, supra. 3/ We concluded that in view of the circuit court's reversal of the district court's decision and its statement that it did not reach the question of whether the district court erred in essentially overturning the notation rule, that rule could continue to be invoked by the Department, citing State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972). We adhere to that conclusion herein.

In Toohey, we did recognize one major exception to the notation rule, *i.e.*, where either the Department by regulation or Congress by legislation has effectively limited application of the notation rule. In Toohey, we declined to apply the notation rule where Congress in section 204(b)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(b)(1) (1982), specifically provided that the segregative effect of an application for withdrawal expires after a two-year period of time. In essence, we held that regardless of whether the public land records continue to reflect an application for withdrawal, neither BLM nor the public can ignore the fact that the statute itself operates to nullify the effect of the application for withdrawal. Appellant cites Northern Pacific Railway Co. v. DeLacey, 174 U.S. 622 (1899), which is in accord with the exception to the notation rule set forth in Toohey. Nevertheless, we conclude that there is a great difference between a Departmental regulation or Act of Congress, both of which are clearly a matter of public record, which invalidate a claim having a segregative effect and, as in this case, a July 1964 BLM decision which was not publicly disseminated. See B. J. Toohey, supra at 92 n. 13, 92 I.D. at 332 n. 13. In the latter instance, both BLM and the public justifiably

3/ Appellant Schnabel's citation to Hodges v. Colcord, supra, is inapposite. That case dealt with the substantive withdrawal occasioned by an entry under the homestead laws and not with application of the notation rule.

relied on the notation of the public land records, even though erroneous, until the notation was deleted. 4/

Therefore, we conclude that given the notation of the MTP as subject to state selection A-60929 at the time appellants located their mining claims and filed their location notices for recordation with BLM, BLM properly declared appellants' claims null and void ab initio and rejected their location notices for recordation.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr. Administrative Judge

4/ Schnabel also argues that the notation rule is not applicable because, since prior to the filing of state selection application A-60929, the land in his claims has been subject to either his original claims, invalidated "[i]n 1980," or his present relocated claims, and that, in fairness to him, the rule should not be applied. See John J. Schnabel, 50 IBLA 201 (1980). Appellant, however, overlooks the fact that his present claims, which are subject to adjudication herein, do not predate the state selection and that whatever rights he had under his original claims have been lost by the declaration of invalidity. R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979). Moreover, to fail to invoke the notation rule herein for the sole benefit of appellant would not be fair to other potential claimants who might have otherwise located a competing claim at any time that the land was erroneously noted as subject to the state selection. Appellant has, in any case, also informed the Board that, during the pendency of this appeal, he once again relocated his claims after BLM deleted the notation of state selection A-60929 from the "land status records." BLM submits copies of these relocation notices filed for recordation with BLM on July 12, 1984, indicating that the claims had been relocated July 8, 1984.